No. 46965-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

STACY MILTON THORNTON

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Erik Price, Judge
Cause No. 14-1-00266-5

BRIEF OF RESPONDENT

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1. Whether defense counsel's lack of objection to certain points of testimony from several witnesses called by the State fell below the standard of a reasonably prudent attorney.

a. Lack of objection to Detective Johnstone's testimony about his investigation.

b. Lack of objection to two associates of Thornton who testified to the culture of the drug addicted homeless in Olympia.

2. Whether defense counsel's alleged errors caused prejudice and denied the defendant effective assistance of counsel.

3. Whether appellate costs should be imposed on the defendant.

B. STATEMENT OF THE CASE.

i. Factual History

Sometime in 2013, the defendant Stacy Thornton, spent time in the Thurston County Work Release program. RP 194.[1] During his time in the program, he met a fellow inmate by the name of Marcus Hodnett. In December of 2013, Thornton was homeless and living in downtown Olympia, and again crossed paths with Hodnett. Thornton was informed by Hodnett of an old, abandoned

1. All references to the Verbatim Report of Proceedings are from the two volume transcript dated November 17-18, 2014.

government building where they could sleep at night. RP 196. Thornton stayed with Hodnett in this building on several occasions, where they used drugs, including methamphetamine and marijuana. RP 198.

At some point during Thornton's initial stay in the building, Hodnett informed him of a ring Hodnett had stolen and was planning on pawning or selling. RP 68. However, Hodnett did not have any identification, and asked Thornton if he could pawn the ring. RP 204. The two men then had acquaintances drive them to a pawn shop in Yelm. RP 68. This first shop did not have enough cash to purchase the ring. Another shop did not deal in jewelry. The group then went to Cash Northwest in Lacey. RP 69-72. Upon arrival, Thornton went inside, provided his ID, and intimated to the pawn shop employee that the ring was his. He received $1,000 for the ring. Hodnett stated he gave Thornton $200 for his share of the profit, but Thornton claims he only received $50. RP 74, 211.

In February 2014, Detective Johnstone with the Olympia Police Department had occasion to check on stolen goods through local pawn shop websites where items are tracked. RP 39. He found the ring that Thornton had pawned, which had been stolen from Jay Dean's Tumwater residence several weeks previously. RP

114-118. Detective Johnstone determined who had pawned the ring and subsequently notified other officers that he was looking for Thornton. RP 42. Several days later, Thornton was arrested by Olympia police officers. Detective Johnstone later interviewed Thornton about the stolen ring. RP 43. Thornton confirmed to Johnstone that the ring was not his, Hodnett had asked him to pawn it, and that the whole situation was "sketchy." RP 248.

ii. Procedural History

Thornton was charged with Trafficking in Stolen Property in the first degree. CP 10. The charges were later amended to include Bail Jumping in relation to a missed court hearing. CP 10. At trial in November 2014, the State called several witnesses to testify to the events surrounding the pawning of the stolen ring. Marcus Hodnett and Kelly Olsen, a former girlfriend of Hodnett's who was also involved in the drug culture of downtown, both testified they associated with Thornton and used drugs with him. RP 52-54, 167-169. They also testified that Thornton likely knew the ring was stolen, as the selling and trading of stolen items was common in the homeless drug culture of downtown Olympia. RP 55, 169.

The State also called Detective Johnstone. When asked to describe his investigation and why he arrested the defendant,

Detective Johnstone stated he believed Thornton knew the ring was stolen and pawned it knowing that it was. RP 46. This exchange was allowed by the court after several objections by the Defense. RP 45. In closing, the State presented its version of the facts, which included reference to circumstantial evidence regarding Thornton's knowledge that the ring was stolen.

Thornton was found guilty of both charges on November 18, 2014. RP 359. He was then sentenced on November 19, 2014. CP 141-151.

C. ARGUMENT.

1. Defense counsel's objections to Detective Johnstone's testimony and lack of objection at other points in the trial were strategic, and did not fall below the standard of a reasonable attorney.

Thornton argues that defense counsel, on several different occasions, failed to properly object to testimony given by the State's witnesses. However, under RAP 2.5(a), an appellate court will not review any claim of error that was not raised in the trial court. State v. Strine, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). Thornton further claims that defense counsel's lack of objections fell below the standard of a reasonably prudent attorney and rendered his defense ineffective.

Claims of ineffective assistance of counsel are reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998).

There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Further, a defendant must overcome the presumption of effective representation. Strickland, 466 U.S. at 689; State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); McFarland, 127 Wn.2d at 334-35.

An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). While it is

easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action [or inaction] of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982).

a. Defense counsel did object to several portions of Detective Johnstone's testimony before it was ultimately allowed by the court.

In the present case, Thornton's initial argument suggests the defense did not raise an objection to Detective Johnstone's testimony. Thornton points to the State's direct examination when the State asked Detective Johnstone about his investigation into the pawning of the stolen ring. Thornton argues that Detective Johnstone's testimony constituted an opinion as to the guilt of the defendant. Thornton further argues, "There is no possible tactical reason for a defense attorney to knowingly fail to object to this type of evidence." Appellant's Brief at 18.

The appellant relies heavily on State v. Carlin, 40 Wn. App. 698, 700 P.2d 323 (1985), to support him claim about the impermissibility of Detective Johnstone's testimony. Thornton is correct that the rule from Carlin states a witness' opinion as to the

guilt of the defendant is impermissible; however, Thornton incorrectly applies that rule to Detective Johnstone's testimony.

In regard to opinion testimony, it is settled that no witness may testify to his opinion by a direct statement or by inference regarding the defendant's guilt. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). However, "[t]he fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion of guilt." State v. Hayward, 152 Wn. App. 632, 649, 217 P.3d 354 (2009) (quoting City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)).

An opinion is not automatically inadmissible just because it addresses an issue that the jury must decide. State v. Kirkman, 159 Wn.2d 918, 929, 155 P.3d 125 (2007). "In some instances, a witness who testifies to his belief that the defendant is guilty is merely stating the obvious, such as when a police officer testifies that he arrested the defendant because he had probable cause to believe he committed the offense." State v. Sutherby, 138 Wn. App. 609, 617, 158 P.3d 91 (2007), *affirmed in part and reversed in part* 165 Wn.2d 870, 204 P.3d 916 (2009).

It is clear Detective Johnstone was describing his investigation and the probable cause related to the investigation. Detective Johnstone was not offering an opinion as to whether the defendant was guilty. Rather, he was testifying as to why he initially sought to arrest the defendant.

Not only was Detective Johnstone's testimony admissible, a review of the record will show that the defense objected twice before Detective Johnstone was allowed to give the testimony. Defense counsel made an immediate hearsay objection to the State's question about Detective Johnstone's opinion. In fact, this objection was sustained. The State tried to reframe the question and defense again objected. At this point, a sidebar was taken by the court. Only after this sidebar concluded the State was allowed to reframe the question once more and Detective Johnstone allowed to answer. RP at 45-46.

It is clear from the record that defense counsel made objections in an effort to bar that portion of Detective Johnstone's testimony. Further, at least one objection was sustained by the court.

Thornton is raising the issue of ineffective assistance of counsel based on his claim that defense counsel failed to object.

When raising an ineffective assistance of counsel claim on direct appeal, the "burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings[.]" McFarland, 127 Wn.2d at 335. However, it is clear from the record that defense counsel specifically objected twice to the State's questions. The record indicates Thornton's counsel was diligent and zealous in the defense of his client, especially on this particular matter.

This specific issue is not a question of trial strategy, nor of trial tactics usually examined by this Court when deciding ineffective assistance of counsel claims. McFarland, 127 Wn.2d at 322 (citing State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994)). Rather, the appellant is asking this court to find his trial counsel ineffective based solely on a selective reading of the proceedings. Thornton's argument is based around a failure of counsel to object. However, the record clearly indicates not one, but two objections by the defense.

b. Defense counsel's lack of objection during the testimony of Marcus Hodnett and Kelly Olsen was tactical and part of a trial strategy.

In Thornton's second issue, he argues that defense counsel's failure to object during Hodnett and Olsen's testimony

about the homeless drug culture of downtown Olympia constituted ineffective assistance of counsel. In the same vein as his first argument, Thornton argues that his counsel's trial strategy fell below the standard of a reasonably prudent attorney. However, as the testimony of both witnesses was admissible, there was nothing to object to. Defense counsel made no error in not objecting.

Thornton argues that Hodnett and Olsen's testimony was inadmissible under ER 404(b). However, that rule does not apply. Hodnett and Olsen testified only to their personal interactions with Thornton and the homeless drug culture of downtown Olympia. They were not testifying to prior bad acts on the part of the defendant, but rather explaining a lifestyle of homeless drug users that would be unfamiliar to the jury.

ER 701 provides that a lay witness may only give "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." The admissibility of lay opinion testimony must relate to a core element or to a peripheral issue. State v. Farr-Lenzini, 93 Wn. App. 453, 462, 970 P.2d 313 (1999) (superseded by statute on other

grounds). As such, there must be strong factual bases to support the witness' opinion. Id. at 463.

In this case, Hodnett and Olsen testified to the culture of which they had long been a part. There was a substantial factual basis for both their testimonies, as they had been homeless for many years, and both had been drug users throughout this time. Their testimony was provided to be helpful to the jury because the average juror would not likely know the norms and mores of the homeless drug culture. *See* State v. Simon, 64 Wn. App. 948, 964, 831 P.2d 139 (1991), *aff'd in part, rev'd in part by* State v. Simon, 120 Wn.2d 196, 840 P.2d 172 (1992), (court allowed detective's testimony about the culture of the pimp/prostitute world to help the jury understand the mores). As the testimony of Hodnett and Olsen was admissible, defense counsel had no cause to object.

Further, as is well established, a reviewing court will not find ineffective assistance of counsel if the action complained of goes to trial tactics or the defense theory of the case. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1995). Yet the presumption of effective performance may be rebutted if there is no conceivable legitimate tactic underlying counsel's action. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Thornton argues that Hodnett and Olsen's testimony about their drug usage was prejudicial and his defense counsel should have objected when the State introduced it. However, this argument fails because it was a clear tactical decision on the part of defense to not object.

There are several legitimate and consequential reasons for not objecting during the witnesses' testimony. First, defense counsel likely did not want to draw attention to his client's past unlawful behavior. An objection would have elicited more scrutiny from the jury. Courts have noted there is a "strong presumption" that when counsel focuses on some issues and not others, it reflects a tactical decision rather than "sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

Further, defense asked Thornton several times on direct about his personal drug use and experiences being homeless. RP at 194-198. This lends credence to the idea that defense understood Thornton's lifestyle would be a central issue during the trial. "'When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.'" State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (*quoting* State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)). Defense likely knew

that it was in Thornton's best interest to have the witnesses' describe the circumstances about the ring, but that defense could create a more sympathetic picture later when it examined Thornton directly.

Finally, it is a rare occurrence that counsel object to opposing counsel's closing. Absent a flagrant misstatement or error, closing argument is generally not the time for counsel to object. Though rarity is certainly not an excuse for a failure to object, the absence of a mistake is. Though the defense may disagree as to the presentation or how the facts played out, this does not mean an objection is the correct course of action.

"Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide range' of permissible professional legal conduct." United States v. Necoechea, 986 F.2d 1273, 1281 (1993) (*citing to* Strickland, 466 U.S. at 689). Thornton's defense counsel made no error in a lack of objection. As the record indicates there were no egregious errors on the part of the State; defense counsel had no reason to object. There was no ineffective assistance of counsel.

2. Defense counsel committed no errors that fell below the standard of a reasonably prudent attorney. Thornton was not prejudiced nor was he denied effective assistance of counsel.

Prejudice occurs when, but for the deficient performance of counsel, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland, 466 U.S. at 689; McFarland, 127 Wn.2d at 335. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 670.

As has been previously demonstrated, Thornton's defense counsel committed no error when he objected to Detective Johnstone's testimony, nor when he declined to object to other statements during the State's case.

However, according to Thornton's argument, the evidence and facts of the case point directly to his innocence: "In light of these exculpatory facts, the state's use of and argument from improper propensity evidence undermines confidence in the jury's verdict in this case." Appellant's Brief at 28. Thornton then asserts

that trial counsel's failure to object caused prejudice. However, as has been previously shown, it is more than likely that defense counsel had specific strategy in mind when choosing to object or not.

Though Thornton has attempted to provide evidence of deficient performance and prejudice, he has not proved either. Rather, it is clear that Thornton is upset with the trial process and the ultimate result of his guilty verdict. However, "[t]he requirement that counsel be effective is not a result-oriented standard. Counsel is required to be competent, but not necessarily victorious." Wiley v. Sowders, 647 F.2d 642, 648 (6th Cir. 1981).

Thornton has not proved, nor has he offered, any substantive argument as to how the trial would have been different had his defense counsel objected to the statements about which he complains. The appellant argues that his counsel was ineffective and caused him prejudice, but offers no substantiation of this claim.

Thornton's defense counsel was effective and caused Thornton no prejudice.

3. Appellate costs should be decided when the cost issue is ripe.

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976[2], the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. Id. at .160(2). In State v. Barklind, 87 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even "chill" the right to counsel. Id., at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In State v. Blank, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997), the Supreme Court held this statute constitutional, affirming the Court of Appeals' holding in State v. Blank, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996). State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000), noted that in State v. Keeney, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory

2. Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

under RAP 14.2 and constitutional, but that "costs" did not include statutory attorney fees. Keeney, 112 Wn.2d at 142.

Nolan examined RCW 10.73.160 in detail. The Court pointed out that, under the language of the statute, the appellate court had discretion to award costs. 141 Wn.2d at 626, 628. The Court also rejected the concept or belief, espoused in State v. Edgley, 92 Wn. App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. Nolan, 141 Wn.2d at 624-625, 628.

In Nolan, as in most of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. Id. at 622. As suggested by the Supreme Court in Blank, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in State v.Sinclair, 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016), prematurely raises an issue that is not before the Court. The defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill, if he does not prevail, and if the State files a cost bill.

Under RCW 10.73.160, the time to challenge the imposition of LFOs is when the State seeks to collect the costs. *See* Blank,

131 Wn.2d at 242; State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing State v. Baldwin, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. Baldwin, 63 Wn. App. at 311; *see also* State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. Id. Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." Blank, 131 Wn.2d at 241–242. *See also* State v. Wright, 97 Wn. App. 382, 965 P.2d 411 (1999).

The defendant has the initial burden to show indigence. State v Lundy, 176 Wn. App. 96 at 104 n.5, 308 P.3 755 (2013). Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs. *See* State v. Woodward, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003). The appellate court may order even an indigent defendant to contribute to the cost of representation. *See* Blank at 236-237, quoting Fuller v. Oregon, 417 U.S. 40, 53-53, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); Woodward, 116 Wn. App. at 704.

The imposition of LFOs has been much discussed in the appellate courts lately. In State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote that:

> The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

Id. at 834. The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. Id. at 835-837. The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. Id. at 838-839.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in

1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. Under the defendant's argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

Even though Thornton has been found indigent in the trial court that is not a finding of indigency in the constitutional sense. Constitutional indigence is more than poverty. State v. Johnson, 179 Wn.2d 534, 553-54, 315 P.3d 1090, *cert. denied*, 135 S. Ct. 139, 190 L. Ed. 2d 105 (2014). Only the constitutionally indigent are protected from the requirement to pay. Id. at 555. Indigency, moreover, is a "relative term" that "must be considered and measured in each case by reference to the need or service to be furnished." State v. Rutherford, 63 Wn.2d 949, 953-54, 389 P.2d 895 (1964); Johnson, 179 Wn.2d at 555.

As Blazina instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as Sinclair points out at 389, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *See* RCW 10.73.160(4).

Certainly, in fairness, appellate courts should also take into account the defendant's financial circumstances before exercising its discretion. It is to be hoped, pursuant to Blazina, that trial courts will develop a record that the appellate courts may use in making their determination about appellate costs. Until such time as more and more trial courts make such a record, the appellate courts may base the decision upon the record generally developed in the trial court, or, if necessary, supplemental pleadings by the defendant.

In this case, the State has yet to "substantially prevail." It has not submitted a cost bill. Thornton offers no evidence of his future ability to pay other than that he was found indigent in the trial court and "it is unrealistic to think the [*sic*] Mr. Thornton will be able to pay appellate costs." Appellant's Brief at 35. This Court should wait

until the cost issue is ripe before exploring it legally and substantively.

D. CONCLUSION.

Thornton has no provided no substantial argument as to how his defense counsel's actions fell below the standard of a reasonably prudent attorney. Defense counsel's objections and strategic lack of objections were part of an overall trial strategy. Thornton suffered no prejudice during the trial process.

Further, this Court should wait until the issue of appellate costs is ripe before exploring it legally and substantively.

Respectfully submitted this 30th day of June, 2016.

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of Brief of Respondent the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 30th day of June, 2016, at Olympia, Washington.

Cynthia Wright

CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTOR

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